IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

No. 138.

THE PULLMAN COMPANY, *Plaintiff in Error*, *vs.* **WIRT ADAMS, State Revenue Agent**, *Defendant in Error.*	Error to Supreme Court of Mississippi.

PETITION FOR REHEARING.

Plaintiff in error respectfully presents this petition for rehearing, because it believes that sufficient consideration has not been given to parts of its argument and its position as to the provision of the Mississippi Constitution that was therein involved and discussed.

Whether the Pullman Company is obliged to accept local passengers upon its cars operated interstate seems to be the question upon which the opinion turns. The opinion concedes that if plaintiff in error is bound to receive such local passengers on its through cars, then the tax is invalid.

In our argument we submitted to the court that the Pullman Company is bound, both by common law and under a provision of the Mississippi constitution, to accept through passengers on its interstate cars. The effect of the provision of the Mississippi constitution is considered in the opinion, but no notice is taken by the court of the position advanced by us, that the Pullman Company is bound at common law to accept local passengers upon its cars, operated interstate.

I.

PLAINTIFF IN ERROR IS OBLIGED BY THE MISSISSIPPI CONSTITUTION TO ACCEPT LOCAL PASSENGERS.

We wish first to call the court's attention again to the provision of the Mississippi constitution. It is:

"Section 195. Express, telegraph, telephone, and sleeping-car companies are declared common carriers in their respective lines of business, and subject to liability as such."

The tax act complained of imposes a privilege tax on every sleeping car company that accepts a passenger from one point to another within the state.

The position advanced by us in our original argument was that the state constitution requires plaintiff in error to furnish sleeping car accommodations to all passengers who properly present themselves and demand such accommodations between points in Mississippi, and that thereupon the tax act referred to imposes a tax. The result of the operation of the combined action of the constitution and the statute is that a sleeping car company entering the state of Mississippi, while engaged in interstate commerce, is *first compelled* to furnish accommodations between points within

that state, and is then to pay a privilege tax for so doing. From this result there seems to be no escape.

In its opinion the court says:

"If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in *Crutcher* v. *Kentucky*, 141 U. S. 47."

The question, as the court states, is whether the effect of the constitution is to impose on the plaintiff in error the obligation to furnish sleeping-car accommodations to passengers between points in Mississippi. If so, then the tax would be invalid. The opinion states that this point is not decided by the Supreme Court of Mississippi, but that that court has thrown out "intimations" on the subject.

The opinion of the Mississippi court is short, and, exclusive of the quotations of the tax act and parts of the opinions in *Osborne* v. *Florida*, 164 U. S. 650, and *Adams* v. *Telegraph Co.* 71 Miss. 565, is as follows (pr. rec. 16):

"The whole purpose of the statute, from its terms manifestly is, to require a privilege tax to be paid for doing business within this State, and for that business alone. It relates exclusively to the local business done by the Pullman Company within this state. It does not require any tax to be paid for the privilege of doing the interstate business of the company. It does not in any manner affect its interstate business."

"The contention that the appellant does its local business at a loss, and yet must do it under the constitution of 1890 making it a common carrier, and hence that its interstate business is indirectly burdened is fallacious. Were that so, it would be the provisions of law declaring the sleeping car companies common carriers, that would contravene the interstate commerce clause of the Constitution—not this

license-tax statute. It is not for the appellant to get all out of the local business the traffic will bear and then escape the correlative burden of this license tax, by pleading that it, though conforming to the law making it a common carrier, as to profits, should not conform to the law taxing the business it does wholly local, and entirely within this state. *Pickard* v. *Pullman,* 117 U. S. 34 is wholly unlike this case. There a tax was levied on each sleeping car, whether in state, or interstate business and the tax was required to be paid if the local business had been entirely abandoned."

In this short opinion and in the references to the *Osborne* case must be found the "intimations" referred to.

We beg the court to re-examine the opinion of the Supreme Court of Mississippi, Record pages 16 and 18. With all due respect we would suggest that the opinion contains no intimation that the Mississippi Court will not insist that the constitution requires the Pullman Company to furnish accommodations to passengers between local points in the State of Mississippi, even though such local business is not desired, and thus subject the company to the tax.

The provision of the state constitution does not necessarily contravene the interstate commerce clause of the federal constitution. It may be operative as applied to a sleeping car company organized for and doing business only in Mississippi. But we cannot separate the state constitution and the state tax act in their effect upon the interstate commerce business in which plaintiff in error is engaged. The result of the state constitution and statute, taken together, is to interfere with interstate commerce as applied to plaintiff in error.

The opinion of this court takes the view that the plaintiff in error is free to renounce the local business, and intimates that if the constitution of Mississippi should be read as im-

posing an obligation to take local passengers and then the tax act impose a tax for so doing, either the clause of the constitution or the tax act, or both, are invalid. That is to say, if the plaintiff in error is not free to renounce the taking of local passengers, then the combined effect of the constitution and tax act in imposing this tax *upon plaintiff in error* is invalid.

It is not necessary, and we are not asking the court, to hold that the state constitution or the tax act, is invalid. We are only asking the court to hold that the tax thereunder, assessed against plaintiff in error, is invalid, because *in this case* it operates as a regulation of, or burden upon, interstate commerce.

But the state court opinion contains no intimation that the Mississippi constitution of 1890 is not intended to require plaintiff in error to accept local passengers. That opinion says that the contention that the Pullman Company must, under the constitution of 1890, accept local passengers, "and *hence* that its interstate business is indirectly burdened, is fallacious." The argument or contention must refer to what comes after the word "hence." A proper paraphrase of the sentence would be,

"Although the Pullman Company does its business at a loss and yet must do it under the constitution of 1890 making it a common carrier, still the argument therefrom that its interstate business is indirectly burdened is fallacious."

The evident meaning of the court is that although the Pullman Company is compelled, as a common carrier under the Mississippi constitution, to accept local passengers and thereby subject itself to a tax, yet that tax relates to the business of accommodating such local passengers, and its interstate business is not indirectly burdened. And further

the opinion intimates that were the interstate business burdened thereby, it would be the Mississippi constitution and not the license tax statute that would contravene the interstate commerce clause of the federal constitution.

The provision of the state constitution standing alone might be valid and also be harmless to plaintiff in error, and the wrong or burden might only arise when the statute was enacted. Both state constitution and statute might be valid as to certain local carriers, and their application to the interstate business of plaintiff in error only be invalid. If such is the case, this court is not called upon to hold that either the state constitution or the state statute is invalid, but only that they cannot be applied to the business of plaintiff in error in such manner as to impose the present tax upon that business.

There is no hint or intimation in the opinion of the Mississippi court that the provision of the Mississippi constitution will not be enforced against plaintiff in error as requiring it to accept local passengers. The reasoning of that opinion is rather that *the local business forced upon plaintiff in error is a distinct business and can be taxed as the state may direct.*

II.

PLAINTIFF IN ERROR IS OBLIGED, UNDER THE COMMON LAW, TO ACCEPT LOCAL PASSENGERS.

The Pullman Company is bound, without reference to the Mississippi constitution, to afford sleeping car accommodations to any person who properly applies therefor.

In *Nevin* v. *Pullman Co.*, 106 Ill., 222, the Pullman Company demurred to a declaration which alleged that it

had refused to receive a passenger who properly presented himself and offered to pay for sleeping car accommodations. The court held that the company must receive such passenger. In so holding the court, quoting from Chitty said, (pp. 228, 229):

"There are, however, some particular instances of persons exercising certain public trades or employments, who are bound by law to do what is required of them in the course of their employments without aid of express contract, and are in return entitled to a recompense, and may, therefore, be sued in case, as for a breach of duty in refusing to exercise their callings."

"It becomes important to determine, with some degree of particularity, the true relation which the Pullman Palace Car Company sustains to the public."

Mentioning the duties laid upon a railroad company to serve the public alike, the court said, (pp. 230-231):

"In what respect, then, does this company differ in its relation to the public, so far as the present inquiry is concerned, from an ordinary railway company? No difference has been pointed out by counsel, and we are confident none can be. Why, then, should not the same principles be held to apply to it that apply to common carriers, and others in like employments, in so far as their relation to the public is the same?"

"Indeed the running of these sleepers has become a business and social necessity. Such being the case, can it be maintained the law imposes no obligations or restrictions on this company in the discharge of its duties to the public?"

"If then this company owes any duties to the community by reason of its relation to the public, as we hold it does, manifestly one of them is, that it shall treat all persons whose patronage it has solicited with fairness, and without unjust discrimination. When, therefore, a passenger, who, under the rules of the company, is entitled to a berth upon payment of the usual fare, and to whom no personal objection attaches, enters the company's sleeping car at a proper time for the purpose of procuring accommodations, and in

an orderly and respectful manner applies for a berth, offering or tendering the customary price therefor, the company is bound to furnish it, provided it has a vacant one at its disposal."

In *Elliott on Railroads*, section 1617, it is said of sleeping car companies, that:

"they are under a duty to serve the public impartially and to exercise reasonable care to furnish the required service. There must be some public duty otherwise such public carriers as railroad companies would have no right to haul cars of sleeping-car companies as parts of regular railway passenger trains."

The case of *Attorney General* v. *London & N. W. Ry. Co.*, 6 Q. B. Div. 216, is commented on and quoted at length with approval, by this court in *Pickard* v. *Pullman Co.*, 117 U. S., on pages 46 and 47. It is there held that sleeping car accommodations are of as public a nature as is the carriage, and that the charges for carriage and for sleeping accommodations, are of the same character and must substantially be considered as one charge, thus putting the duty to furnish sleeping accommodations substantially on the same basis as the duty to furnish transportation.

This court quotes with approval the language of *Lord Coleridge* in saying:

"We regard the additional accommodation afforded by the sleeping carriages as differing in no essential particular from the superior accommodation afforded by a second-class carriage over a third, or by a first-class carriage over both. * * * The charge, though written on a separate ticket, is, in our opinion, part of the charge for the conveyance of the passenger in a particular way, and is, therefore, a part of the charge for the conveyance of a passenger, received and charged for such conveyance."

It is apparent that, regardless of the Mississippi constitution, a duty is imposed on The Pullman Company to fur-

nish its accommodations to all railroad passengers who properly apply therefor. The Company cannot escape this duty, where passengers properly apply for such accommodations, from one point to another within the State of Mississippi, whenever its cars are attached to trains which run through and stop at different points within that State. This is so even though the Pullman cars are engaged primarily in interstate commerce business.

The business in which plaintiff in error is engaged is of such a character that it cannot conduct its interstate commerce business without accepting passengers between places located in the State, as incident to its interstate business.

This Court in its opinion says, "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." The fact would seem to be, however, that the Company is *not* free to renounce the local business.

Mississippi is a long state—over three hundred miles long. Some important towns in the northern part of it are nearly two hundred miles north of Jackson, the capital. Some places within the state are, therefore, a night's ride apart.

We submit it would not be competent for the Pullman Company, on trains running from Chicago to New Orleans or Mobile, to close the doors of its cars on entering the state of Mississippi and refuse to open them until the car passed out of the state. This could not be done because it might have passengers from outside of Mississippi, bound to points inside of the state. If a passenger should present himself, immediately after the sleeping car enters Mississippi from the North, the Pullman Company could not accept him as a passenger if he were bound for New Orleans and reject him if he wished to get off at Jackson or Vicksburg.

III.

THE TAX IS GAUGED BY AND IS A BURDEN UPON THE INTERSTATE BUSINESS OF THE PLAINTIFF IN ERROR.

We again urge upon the court that this tax is gauged by the interstate business done and has no relation to local business. The effect of furnishing accommodations to a single passenger on a single railroad line is to apply the tax on "each mile of railroad track over which the company runs its cars." The record shows that there are six or seven railroads passing through Mississippi, over which the cars of plaintiff in error run, two of the principal of which are the Illinois Central Railroad and the Mobile & Ohio Railroad.

The tax act takes effect upon the mileage of the Illinois Central Railroad Company, immediately upon accommodations being furnished a passenger between two local points on the Mobile & Ohio Railroad, although the Illinois Central trains pass through Mississippi without stopping and no passengers are accommodated. One hundred dollars is imposed and an additional twenty-five cents for each mile of railroad track, including the Illinois Central Railroad track, over which the Pullman Company does only an interstate business. The act does not provide for a tax of twenty-five cents per mile over the line of road on which a local passenger has been accepted. If a local passenger is taken on one line of road, then the tax is gauged by and is a burden upon every mile of railroad over which the Pullman Company transacts its interstate business, including that on which no local passengers were received.

We submit, therefore, that this constitutes an actual bur-

den upon interstate commerce. If the principle is once allowed, and the state is conceded the power so to tax, then the tax may be of any amount, and the interstate commerce operations of plaintiff in error could thereby be practically prohibited.

We submit that as the statute does not confine the tax to the road or roads on which local passengers are accommodated, but extends it to all roads and charges a certain rate per mile on all of them, it is unconstitutional as imposing a burden on interstate commerce.

And in this connection we again desire to call attention to the wording of the act of 1892, which is:

"A tax on privileges and levied as follows, to-wit,"

"3387. Sleeping-car Companies:—On each sleeping and palace-car company carrying passengers from one point to another within this state, one hundred dollars, and twenty-five cents per mile *for each mile of railroad track on which the company runs its cars.*"

It will be observed that the tax is laid upon *all* railroad tracks on which the company runs its cars. A new act was passed in 1898 to take effect from that time, which followed the wording of the old act and added the words, "in this state." But the act of 1892 would not be the first instance of a state attempting to levy a tax on the entire capital stock or the entire business, or the entire property of a corporation, simply because it was doing *some* business in that state.

This court has declared certain state laws invalid on the ground that the taxes imposed by such laws were laid upon interstate commerce. At times the state whose law was thus abrogated has then passed a new law intending to circumvent and defeat the decision of this court. The State of Mis-

sissippi, forbidden to levy a tax on the interstate commerce business of the plaintiff in error, seeks to enforce the same tax by so wording the law that the tax shall only be payable upon the contingency of a passenger being accommodated locally. As shown above, both under the provisions of the Mississippi constitution and under the general common law, the plaintiff in error cannot refuse local business, although it may wish to do so. The case at bar is an illustration of the methods employed to circumvent the provisions of the interstate commerce clause of the Federal Constitution. We would again respectfully call the attention of this court to the extracts from its own opinion condemning such subterfuges, in the cases of *Crutcher* v. *Kentucky*, 141 U. S. 47; *Austin* v. *Tennessee*, 179 U. S. 343, and *Morgan* v. *Louisiana*, 118 U. S. 462, as shown on pages 23 and 24 of our original brief.

For the reasons and considerations above shown, we respectfully ask the court to grant a rehearing in this cause.

J. S. Runnells,
William Burry,
Attorneys for plaintiff in error.

We hereby certify that the foregoing petition for rehearing is, in our opinion, well founded.

J. S. Runnells,
William Burry,
Of Counsel.

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